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No. 06-692

Supreme Court, U.S.
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In The

Supreme Court of the United States

LAURA GONZÁLEZ-VERA, *et al.*,

Petitioners,

v.

HENRY A. KISSINGER, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

Respondents' brief wrongly states that petitioners' claims are barred from this Court's review. In addition, respondents mischaracterize several of petitioners' arguments regarding the two distinct issues of subject matter jurisdiction and justiciability. This reply serves to clarify the record for this Court.

I. RESPONDENTS MISCHARACTERIZE PETITIONERS' ARGUMENTS REGARDING THE IMPORTANT DISTINCTION BETWEEN SUBJECT MATTER JURISDICTION AND JUSTICIABILITY NOTED IN *BAKER V. CARR*

Respondents mischaracterize the heart of petitioners' claims by wrongly stating, "petitioners do not contend more specifically that it was inappropriate for the court of appeals to determine that petitioners' claims were nonjusticiable under the political question doctrine *before* considering whether petitioners' claims should be dismissed on other grounds." Respts.' Br. 10. In fact, that is exactly what petitioners claim. *See* Petrs.' Br. 12 ("Only after holding that subject matter jurisdiction exists can the courts embark on the political question analysis."). Petitioners' core argument revolves around the distinction between subject matter jurisdiction and justiciability. A failure to adhere to this distinction directly contradicts Supreme Court precedent. *See Baker v. Carr*, 369 U.S. 186, 198 (1962) (emphasizing the significant distinction between subject matter jurisdiction and justiciability and explaining, "[i]n the instance of nonjusticiability, consideration of the cause is not wholly and immediately foreclosed").

Respondents fail to squarely address petitioners' arguments regarding subject matter jurisdiction. Petitioners ask this Court to first address the issue of subject matter jurisdiction and then the application of the prudential political question doctrine. As a matter of practicality, the issue of justiciability cannot be addressed without a preliminary determination of whether jurisdiction exists. *See Malay. Int'l Shipping Corp. v. Sinochem Int'l Co. Ltd.*, 436 F.3d 349, 358 (3rd Cir. 2006) (stating that "an actual determination must be made whether subject matter jurisdiction exists before a court may turn to the merits of a case."); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101-02 (1998) (concluding that courts cannot make a determination on the merits of a case prior to a determination of jurisdiction). Respondents ignore the importance of addressing subject matter jurisdiction before justiciability by relegating their rebuttal of petitioners' jurisdiction argument to a footnote at the end of their brief.

Respondents rely on *Tenet v. Doe*, 544 U.S. 1 (2005), to incorrectly dismiss petitioners' argument that jurisdictional determinations precede justiciability determinations. Respts.' Br. 10 n.2 (arguing that a court's application of the political question doctrine can be decided before a jurisdictional question because the political question doctrine is designed to preclude "judicial inquiry"). Respondents have put forth a flawed legal argument because the political question doctrine is decidedly not meant to bar judicial inquiry. Under a proper application of the political question doctrine courts must engage in a discriminating case-by-case analysis, which itself involves judicial inquiry. *See Baker*, 369 U.S. at 210-17.

As respondents note in their brief, *Tenet* reinforces the proposition that courts do not need to address subject matter jurisdiction before addressing other "threshold" issues that preclude judicial review. 544 U.S. at 6 n.4. The Court of Appeals, however, did not err in this manner in the present case. Rather, it held that the political question doctrine is always a matter of subject matter jurisdiction, thus directly contradicting *Baker* and failing to perform the analysis required by *Baker* and its progeny. *See González-Vera v. Kissinger*, 449 F.3d 1260, 1262 (D.C. Cir. 2006). *Tenet* supports petitioners' argument, for it emphasizes the importance of identifying potential bases for dismissal as prudential or jurisdictional. 544 U.S. at 6 n.4. Respondents' contention that it is "indisputable that a district court could dismiss a case based on the political question doctrine, regardless whether such a dismissal is characterized as 'jurisdictional' or merely prudential" fails to acknowledge this distinction. Respts.' Br. 10.

Respondents erroneously conclude that "it is irrelevant for present purposes whether the political question doctrine is properly described as 'jurisdictional' in nature." *Id.* Under respondents' reasoning a court could judge the merits of a case before addressing jurisdiction. The Court of Appeals recognized the relevance of jurisdictional determinations when it reasoned that "[a] dismissal based upon the political question doctrine is not an adjudication on the merits." *González-Vera*, 449 F.3d at 1262. Nonetheless, the Court of Appeals failed to adhere to this requirement when it characterized the political question doctrine as an element of subject matter jurisdiction. *Baker* clearly emphasizes the importance of the distinction between subject matter jurisdiction and justiciability. 369 U.S. at

198 (determining that "[t]the distinction between the two grounds is significant.").

In this case, the district court has already found in favor of the petitioners against one defendant. *See* Order for Default Judgment against Michael Vernon Townley, CV 02-02240 (Nov. 23, 2005). This demonstrates that the court can assess petitioners' claims against the respondents and then make a determination if their claims are barred from adjudication. The district court's ability to assess these claims against one defendant but not another is evidence of a determination based on the merits rather than a determination of jurisdiction.

Respondents fail to see that the Court of Appeals has directly contradicted *Baker*'s central holding. This error goes beyond the issue of the order in which threshold decisions are to be made. It conflates the constitutionally significant difference between those cases that a federal court is powerless to hear and those in which it must carefully consider whether its power should be exercised.

II. RESPONDENTS' REASONING PRECLUDES A *BAKER V. CARR* CASE-BY-CASE FACTUAL ANALYSIS BY STATING THAT PETITIONERS' CLAIMS ARE NONJUSTICIABLE

Respondents' characterization of this case and *Schneider v. Kissinger* as "materially identical claims" is problematic. Respts.' Br. 5 (citing *Schneider*, 412 F.3d 190 (D.C. Cir. 2005)). Petitioners' claims in this case are factually distinguishable from those in *Schneider*. To treat them as factually similar merely because they took place in Chile within the context of the Cold War imposes a judicial bar that is without precedent. Never before has a court relied on facially similar factual scenarios to automatically dismiss different cases without

conducting a sound judicial analysis. The acts alleged in this case took place after the enactment of the Hughes-Ryan Amendment, which prohibited the funding of covert activities without congressional authorization. Respondents' actions as pled clearly violated this congressional enactment, which was not at issue in *Schneider*. Further, upholding the Court of Appeals' decision to treat the claims in this case and *Schneider* alike would preclude the discriminating analysis that this Court set out in *Baker*. 369 U.S. at 210-17.

Respondents contend that "by enacting statutes such as the Torture Victim Protection Act (TVPA), Congress did not somehow preclude the application of the political question doctrine to claims under those statutes." Respts.' Br. 8. Petitioners, however, do not contend that the TVPA precludes application of the political question doctrine, but rather that the TVPA (a) provides evidence of judicially manageable standards and therefore informs a political question analysis, and (b) proves conclusively that executive branch complicity in torture is within the realm of judicial cognizance. Petrs.' Br. 18.

CONCLUSION

For the foregoing reasons, we respectfully submit that this Court should grant the petition for certiorari.

Respectfully submitted,

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